IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
KELLY AND HEATHER FREY,	)	**Case No. 98-21031**
	)	
	)	**MEMORANDUM OF**
	)	**DECISION AND ORDER**
Debtors.	)	
	)	

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Louis D. Garbrecht, Coeur d'Alene, Idaho, for Debtors.

Ford Elsaesser, Sandpoint, Idaho, Trustee.

Office of the U.S. Trustee, Boise, Idaho.

Background

The Debtors, Kelly and Heather Frey, filed a voluntary petition for relief on November 12, 1998. In February, 1999, they moved to dismiss their chapter 7[1] case. § 707(a).

[1] Unless otherwise indicated, all references to "code," "title," "chapter" and "section" are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330, and all references to "rule" are to the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 1001 - 9036.

The Debtors allege, and the record reflects, that Mr. Frey did not appear for examination at the originally scheduled first meeting of creditors on January 11, 1999, though Mrs. Frey did. Nor did Mr. Frey appear at a continued first meeting of creditors on February 8. The Debtors assert that they wish to "proceed jointly" through bankruptcy, and therefore want to dismiss this case, and then later refile and prosecute another § 302 joint chapter 7 case.

The Trustee initially indicated to Debtors' counsel (and his minutes of the February 8 second § 341(a) meeting reflect) an intention to seek dismissal of the case due to Mr. Frey's failure to appear. The Trustee now opposes dismissal because he has discovered that the Debtors are expecting tax refunds of some $1,800.00 for 1998, which he asserts should be administered for the benefit of creditors.

Debtors' counsel acknowledged, at the hearing on the motion, that tax refunds were anticipated, and candidly admitted that he expected the Debtors wanted to dismiss their bankruptcy case in order to receive and utilize the refunds before refiling for bankruptcy relief. The Court took the Debtors' motion to dismiss under advisement after hearing the arguments of counsel. The U.S. Trustee has, since that hearing, filed its own motion to dismiss the case under Local Bankruptcy Rule 2003.1(c) for the failure of Mr. Frey to attend the meeting of creditors.

Discussion

A. Is the Trustee estopped from opposing the motion?

The Debtors first argue that, under principles of estoppel, the Trustee should not be allowed to change his mind and oppose dismissal of the case after having indicated an intent to dismiss for Mr. Frey's failure to appear. There are several problems with this argument.

First of all, no authority has been provided to support the concept that a Trustee may be so estopped. The Debtors, of course, carry the burden to support their contention that estoppel is appropriate.

The Court has reviewed several estoppel theories which exist under Idaho law, including judicial estoppel, *Robertson Supply, Inc. v. Nicholls*, 952 P.2d 914, 916 (Idaho Ct.App. 1998), equitable estoppel, *Willig v. Department*

of Health and Welfare, 899 P.2d 969, 971 (Idaho 1995), and quasi estoppel, *Lunders v. Estate of Snyder*, 963 P.2d 372, 378 (Idaho 1998), and find none applicable to the situation presented here. The Trustee's change of position is reasonable and justified on the facts as they have developed in the case.

Parties seeking the imposition of equitable remedies must themselves be free of equitable taint. Such "clean hands" are not evident here. The Debtors attempt to hold the Trustee to a position taken prior to his knowledge of the magnitude of the tax refunds when they themselves wish to undo their chapter 7 filing based on their own discovery of the same fact.

The Court concludes the Trustee is not estopped from contesting the Debtors' motion to dismiss.

B. Is dismissal under § 707(a) appropriate?

Unlike the situation in chapter 13 cases, there is no "absolute" right of a chapter 7 debtor to dismiss. *Compare* § 1307(b). The motion to dismiss by the Debtors falls under § 707(a), which requires "cause" and an order of the Court following notice and a hearing.

Notice was given here, and hearing held, and no creditors filed or voiced opposition. However, the Trustee did, and *In re Hall*, 15 B.R. 913 (9th Cir. BAP 1981) establishes his right to oppose debtors' voluntary dismissal even if no creditors do so. See also *In re Watkins*, 229 B.R. 907 (Bankr. N.D.Ill. 1999). The motion, and the opposition, are properly before the Court.

This Court has previously recognized that the two keys to a debtor's dismissal from the bankruptcy process under § 707(a) are (i) the existence of cause and (ii) the absence of prejudice to creditors. *In re Miller*, 93 I.B.C.R. 270 (Bankr.D. Idaho 1993); *In re Clampitt*, 92 I.B.C.R. 153 (Bankr.D. Idaho 1992).

The types of "cause" enumerated in § 707(a)(1) - (3) are not exclusive.

§ 102(3); *In re Padilla*, 214 B.R. 496, 498 (9th Cir. BAP 1997). But the movants must allege and establish some sort of cause for the proposed dismissal. "When a debtor seeks dismissal of a voluntary case, the relevance of the 'cause' requirement has been questioned. The majority of cases, however, seem to require some cause for dismissal even in this situation, although the

cause may simply be that dismissal is in the best interest of the debtor and not prejudicial to creditors." 6 Collier on Bankruptcy ¶ 707.03[3] (15th ed. Rev. 1998) (footnotes omitted).

Collier continues, in regard to the second element: "When the debtor seeks dismissal, courts must take care to assure that creditors will not be prejudiced by a dismissal." *Id.; see also, Hall*, 15 B.R. at 915; *Miller*, 93 I.B.C.R. at 271; *Clampitt*, 92 I.B.C.R. at 153; *Watkins*, 229 B.R. at 908-9. *Hall*, for example, recognized that prejudice to creditors would occur if the debtors were allowed to dismiss and refile in order to rectify a failure to properly secure a homestead exemption. Similar prejudice would arise here should the Debtors be allowed to dismiss, consume the refunds, and refile.

The only "cause" alleged here is the Debtors professed desire to proceed "jointly" through chapter 7. But that goal need not be achieved only through dismissal of this case and the refiling of another. It can also be achieved by Mr. Frey appearing for a § 341(a) first meeting, sitting for his § 343 examination, and complying with his § 521 duties in this case. The Debtors have neither alleged nor proven an impediment to Mr. Frey doing so; indeed, any such impediment would also presumably frustrate a subsequent joint case.

Rather, it appears to the Court that the real "cause" is a desire of the Debtors to retain the benefit of unexpectedly high 1998 tax refunds, which otherwise will be administered by the Trustee for the benefit of creditors. The Court finds this to be insufficient "cause" under the contemplation of § 707(a), and it indeed proves the prejudice to creditors which the case law and commentary indicates must be avoided.

Conclusion and Order

Because the Debtors have not established cause for dismissal or the absence of prejudice to creditors, their motion to dismiss their chapter 7 case is DENIED. For the foregoing reasons, the Court also concludes that the U.S. Trustee's application to dismiss should be, and the same is DENIED.

The Trustee is ORDERED to cause another § 341 meeting for Mr. Frey to be scheduled and for appropriate notice to be issued.

Dated this 22nd day of April, 1999.